No. 88-10

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

HARTE-HANKS COMMUNICATIONS, INC.,
Petitioner,

v.

DANIEL CONNAUGHTON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is the Sixth Circuit's opinion in this case an appropriate illustration of the manner in which the Supreme Court has instructed appellate courts to review libel judgments in favor of public figures, such as will serve as a model precedent without embellishment by this Court?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Dan Connaughton respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 842 F.2d 825 (6th Cir. 1988).

This is the paradigm case which demonstrates that under the *New York Times*[1] rule a public figure can secure a libel verdict which can emerge unscathed from the independent, *de novo* appellate review mandated by *Bose*,[2] where the evidence of actual malice is so pervasive as to persuade the Court of Appeals that the jury reasonably found that the plaintiff's proof of actual malice was clear and convincing.

[1] *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

[2] *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).

CONSTITUTIONAL PROVISION INVOLVED

Seventh Amendment, United States Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Counterstatement Of Facts

On November 1, 1983, the *Journal News*, a division of Harte-Hanks Communications, Inc., published a front page article quoting a woman named Alice Thompson as stating that Daniel Connaughton, a candidate for Municipal Judge, promised her sister and her jobs and trips and other benefits "in appreciation" for their grand jury testimony, that corrupt practices, including bribery, were occurring in the Hamilton Municipal Court, and that Connaughton told her that he intended to play a tape of their statements for incumbent Judge Dolan, his opponent, to force Dolan to resign. The article began by quoting Thompson as charging Connaughton with "dirty tricks" in promising her anonymity and not delivering it.

The statements attributed to Thompson, other statements appearing in the article, and the headline, were false and defamatory in that they were damaging to Connaughton's professional reputation. The article may have caused him to be defeated for judge at the November 8, 1983 election.

The employees of the *Journal News* who designed the article and decided to publish it knew that the article was harmful to Connaughton and was potentially libelous. They also knew that it was probably false, because all of the people asked by the *Journal News* whether Connaughton made the statements in question to Thompson at the meeting when

Thompson told the newspaper they were made, told the *Journal News* that Connaughton made no such statements, and because they also knew that Thompson had been convicted of a crime of deception, had a history of psychiatric illness, and had an admitted motive to fabricate the statements she made to the *Journal News* about Connaughton.

The *Journal News* consciously avoided pursuing clearly available means of making absolutely certain that Thompson's statements were false. Yet, by the time of the prepublication conference when they made the final decision to publish the article, the *Journal News'* decisionmakers had formed the belief that Thompson's damaging accusations against Connaughton were based on Thompson's misinterpretations of what she had heard.

But, notwithstanding entertaining very serious doubts as to the truth of Thompson's statements, the *Journal News* nonetheless published them, because it was smarting from the *Cincinnati Enquirer's* front page expose of corruption in the Hamilton Municipal Court and was anxious to reestablish the *Journal News* as the dominant news force in Hamilton politics, and also because it wished to revive the sagging campaign of incumbent Judge Dolan, who had been badly wounded by the *Cincinnati Enquirer* and had come to the *Journal News* asking for aid and comfort. The *Journal News'* method of accomplishing these dual objectives was that of using Thompson's statements to turn the focus of Hamilton public opinion from the authentic issue of corruption in Judge Dolan's court to the spurious issue of whether Connaughton had employed unethical means to obtain grand jury testimony against Judge Dolan and his Director of Court Services, Billy New.

Procedural History

The case was tried to a jury before Honorable Carl B. Rubin, Chief Judge of the United States District Court for the Southern District of Ohio, in a bifurcated proceeding. The

liability trial resulted in three separate verdicts for the plaintiff, culminating in the verdict that the *Journal News* published a defamatory, false article about the plaintiff with actual malice.[3]

Thereafter, the issue of damages was tried to the same jury, which awarded the plaintiff $5,000.00 in compensatory damages and $195,000.00 in punitive damages.

Prior to trial, Harte-Hanks moved for Summary Judgment, advancing, *inter alia*, two legal defenses — that the *Journal News* is immune from liability because Thompson's statements were opinions rather than facts, and that the doctrine of neutral reportage gave the newspaper a privilege to publish the article in question. The District Court addressed and disposed of both defenses in denying the motion.

Subsequent to the judgment below, the defendant moved for Judgment n.o.v., and in denying that motion the District Court stated, "the Court is of the opinion that a properly impaneled jury, correctly instructed, awarded a verdict against the defendant that is appropiate from the evidence adduced." (Doc. No. 72)

The Sixth Circuit panel which heard the appeal devoted more than a year to conducting the painstaking, *de novo* review of the record mandated by this Court in *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), "to ensure that the judgment does not pose a forbidden intrusion into First Amendment rights of free expression." *Connaughton* v. *Harte-Hanks Communications, Inc.*, 842 F.2d at 828 (6th

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[3] Number one, "Do you unanimously find by a preponderance of the evidence that the publication in question was defamatory toward the plaintiff?" "Yes."

Number two, "Do you unanimously find by a preponderance of evidence that the publication in question was false?" "Yes."

Number three, "Do you unanimously find by a clear and convincing proof that the publication in question was published with actual malice?" "Yes."

Cir. 1988). A panel majority consisting of Judges Krupansky and Keith affirmed the judgment. Judge Guy dissented.

Petitioner then availed itself of its final recourse at the appellate level by filing a Petition For Rehearing And Suggestion For Rehearing En Banc. After receiving Appellee's Response To Petition For Rehearing, the Court of Appeals entered this Order:

> The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.
>
> The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Thus, now it may fairly be said that no fewer than nine federal judges[4] share the opinion that no reason exists to reverse the judgment in favor of the Respondent, as the verdict rests upon clear and convincing evidence of actual malice.

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[4] The District Judge plus at least eight of the fifteen active judges of the Sixth Circuit.

REASONS WHY THE PETITION SHOULD BE DENIED

(1) This Case Was Correctly Decided

In its Petition For Rehearing the Petitioner argued that the Court of Appeals applied an incorrect standard of review, and, mirroring Judge Guy's dissent, that certain statements which Connaughton made to the *Journal News* mandate a reversal of the judgment, and it makes the same argument to this Court.

Respondent demonstrated to the Court of Appeals' satisfaction that neither of those arguments is well taken. Judges Krupansky and Keith assiduously traced and applied the evolving *New York Times* rule to this case, and, moreover, gave the record as exhaustive an independent review as the most stringent reading of *Bose* could command. The Court of Appeals doubtless understood that Petitioner was urging it to substitute Petitioner's view of the evidence for that of the jury in derogation of Connaughton's right to a jury trial guaranteed by the Seventh Amendment. The Sixth Circuit also understood that inasmuch as the Panel Majority correctly assessed the entire record as containing sufficient evidence of actual malice to support a plaintiff's verdict, Connaughton was clearly entitled to have the jury believe his version of the facts instead of the newspaper's, and therefore to prevail on appeal. The fact that Petitioner does not agree with the jury's or the Trial Court's or the Court of Appeals' view of the evidence is beside the point, as this Court has never stated that in order for a public figure to recover against a newspaper the evidence of actual malice has to be uncontroverted.

There is nothing in *Bose* in which the Petitioner can take comfort and much which cuts against its position. Contrary to what Petitioner asserts, *Bose* does not deal the "clearly erroneous" standard of appellate review out of public figure libel litigation, but, rather, as the Court of Appeals recognized in this case, strikes a pragmatic balance between Rule 52(a) and the rule of independent review applied in *New*

York Times, being "faithful to both." *Connaughton*, *supra*, at 829. A finding may be set aside only where, "the reviewing court *on the entire record* is left with the definite and firm conviction that a mistake has been committed," minding the command of Rule 52(a) that " 'due regard' shall be given to the trial judge's [or jury's] opportunity to observe the demeanor of the witnesses." *Id.*

Petitioner would have this Court regard *Bose* as authority for the hypothesis that its blatant mischaracterization of Connaughton's speculation as to why Thompson may have misunderstood him, buried under an avalanche of evidence of actual malice, somehow mandates a reversal of the judgment. However, the analytical method the *Bose* Court adopted trenches in the opposite direction. In *Bose* this Court went out of its way to make clear that the testimony upon which the reversal of the plaintiff's judgment hinged would not have rebutted "any evidence of actual malice that the record otherwise supports . . .", *Bose*, *supra*, at 512, had there been any such evidence. Understanding *Bose* correctly, the Court of Appeals did not misperceive Petitioner's interpretation of Connaughton's answers as rebutting the overflowing evidence of actual malice which both the jury and the Panel Majority found clear and convincing. Thus, the Sixth Circuit clearly understood the teaching of the *Bose* opinion. Judge Krupansky's footnoted observation is particularly instructive:

> The dissent, by characterizing as admissions Connaughton's answers to the *Journal* reporter's hypothetical questions during the interview of October 31st, which questions were calculated to elicit purely speculative answers and conjectures, without considering Connaughton's expressed denials to direct questions concerning Thompson's controversial testimony and her purely subjective understandings of Connaughton's statements, or any of the other evidentiary evaluations of the conflicting testimony, clearly demonstrates the wisdom of the Supreme Court's teachings in *Bose*, which were designed to protect a plaintiff's rights to a jury trial in a

> defamation case against invasion of the jury's fact-finding perogatives anchored in credibility assessments of witnesses available only to the actual trier of fact.

Connaughton, *supra*, at 836.

The record in this case discloses a panoply of diverse evidence of actual malice,[5] including the admissions of both

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[5] The Court of Appeals stated:

A review of the entire record of the instant case disclosed substantial probative evidence from which a jury could have concluded (1) that the *Journal* was singularly biased in favor of Dolan and prejudiced against Connaughton as evidenced by the confidential personal relationship that existed between Dolan and Blount, the *Journal* Editorial Director, and the unqualified, consistently favorable editorial and daily news coverage received by Dolon [Dolan] from the *Journal* as compared with the equally consistently unfavorable news coverage afforded Connaughton; (2) that the *Journal* was engaged in a bitter rivalry with the *Cincinnati Enquirer* for domination of the greater Hamilton circulation market as evidenced by Blount's vituperous public statements and criticism of the *Enquirer*; (3) that the *Enquirer's* initial expose of the questionable operation of the Dolan court was a high profile news attraction of great public interest and notoriety that had "scooped" the *Journal* and by Blount's own admission was the most significant story impacting the Connaughton-Dolan campaign, (4) that by discrediting Connaughton the *Journal* was effectively impugning the *Enquirer* thereby undermining its market share of the Hamilton area; (5) that Thompson's emotional instability coupled with her obviously vindictive and antagonistic attitudes toward Connaughton as displayed during an interview on October 27, 1983, arranged by Billy New's defense attorney, afforded the *Journal* an ideal vehicle to accomplish its objectives; (6) that the *Journal* was aware of Thompson's prior criminal convictions and reported psychological infirmities and the treatment she had received for her mental condition; (7) that every witness interviewed by *Journal* reporters discredited Thompson's accusations; (8) that the *Journal* intentionally avoided interviewing Stephens between October 27, 1983, the date of its initial meeting with Thompson, and November 1, 1983 when it printed its first story even though it knew that Stephens could either credit or discredit Thompson's statements; (9) that the *Journal* knew that publication of Thompson's allegations charging Connaughton with unethical conduct and criminal extortion and her other equally damaging statements would completely discredit and irreparably damage Connaughton personally, professionally and politically; (10) that its prepublication legal review was a sham; (11) that the *Journal* timed the release of the initial story so as to accommodate follow-up stories and editorial comments in a manner calculated to peak immediately before the election in an effort to maximize the effect of its campaign to discredit Connaughton and the *Enquirer*. 842 F.2d at 843-4.

the News Director and the author of the article that they made no determination as to whether Thompson's defamatory statements about Connaughton were true,[6] and of the newspaper's lawyer that at the prepublication conference the News Director, Managing Editor and Publisher told him that Thompson's statements were based upon her misinterpretations of what Connaughton said.[7]

Petitioner unfairly accuses the Court of Appeals of equating, "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers", *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 155 (1967) (plurality opinion of Justice Harland), with actual malice.

A careful reading of the *Connaughton* opinion reveals Petitioner's argument in this regard to be disingenuous. Indeed, the Panel Majority made it abundantly clear that it viewed "jounalistic malpractice" as merely among "the type of substantive evidence that offers assistance to a reviewing court in exercising its independent judgment to determine if the evidence bearing upon the constitutional issue of actual

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[6] News Director Blount admitted that when the *Journal News* published the article, "there is no judgment on our part as to who was telling the truth" (Tr. 638, 9).

[7] "*I was told* as we went over this line by line *that* Dan Connaughton did deny making any offers and that *she misinterpreted his comments and discussions about the jobs and trips.*" (Tr. 819)

Petitioner goes out of its way to refer to that as a "strained" interpretation of Irwin's testimony. (Petition, p. 8, footnote 6). But the transcript demonstrates that such is not the case. Irwin, an experienced lawyer, was asked at trial whether he made that precise statement during his deposition and he acknowledged that he did. *Id.*

malice is sufficiently clear and convincing to support the verdict." *Connaughton*, *supra*, at 845. The Court pointed out that *Herbert* v. *Lando*, 441 U.S. 153 (1979), "teaches that the presence or absence of motive and/or other circumstances as heretofore discussed for publication of the article may reflect upon the publisher's intent and purpose to publicly disseminate the article in controversy," *Connaughton*, *supra*, at 845, and recognized that, " 'It is well established that evidence that a publisher failed to investigate does not, *by itself*, prove actual malice.' *Hunt* v. *Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983) (emphasis added) (citing *St. Amant*, 390 U.S. at 732-33, 88 S.Ct. at 1326)." *Id.* at 846.

It is clear that Judge Krupansky read the record as demonstrating that the conduct of the *Journal News* disclosed a state of mind far worse than that which is inferrable from even an extreme departure from adversary standards of investigation:

> Although the *Journal* attempted to characterize its failure to contact Stephens as an act of negligence that was insufficient to establish actual malice, its failure to interview her must be considered in conjunction with other direct and circumstantial evidence bearing on the issue of "actual malice."

Connaughton, *supra*, at 846.

(2) There Is No Conflict Between Circuits Or Confusion In Caselaw Which Requires Clarification

Contrary to Petitioner's contention, the D.C. Circuit's decision in the *Tavoulareas*[8] case is not legally inconsistent with the Sixth Circuit's decision in this case. That the former court upheld the district court's Judgment n.o.v. in favor of the defendants, whereas the Sixth Circuit affirmed a jury verdict in favor of the plaintiff, does not establish legal tension between the two circuits, inasmuch as both appellate courts faithfully followed the procedure this Court established in *New York Times* and *Bose* for reviewing judgments in public figure libel cases. As the D.C. Circuit stated in *Tavoulareas*, ". . . by virtue of the First Amendment nature of this litigation, the jury verdict must be measured, on the basis of an independent examination, against the heavy burden of proof imposed on a plaintiff who is a public figure:

> In reviewing a defamation verdict, courts must exercise particularly careful review. They "must 'make an independent examination of the whole record,' . . . so as to assure [themselves] that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times* v. *Sullivan*, 376 U.S. 254, 285, 84 S.Ct. 710, 729, 11 L.Ed.2d 686 (1964) (quoting *Edwards* v. *South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963)."

817 F.2d at 776.

The Sixth Circuit's opinion in this case reproduced the above-recited quotation from *New York Times* and added, "Guidance in harmonizing the rules confronting the court in its search for a resolution is afforded by the pronouncements of *Bose Corp.*:

> Our standard of review must be faithful to both Rule 52(a) and the rule of independent review applied in *New*

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[8] *Tavoulareas* v. *Piro*, 817 F.2d 762 (D.C. Cir. 1987).

York Times Co. v. *Sullivan*. The conflict between the two rules is in some respects more apparent than real. The *New York Times* rule emphasizes the need for an appellate court to make an independent examination of the entire record; Rule 52(a) never forbids such an examination, and indeed our seminal decision on the Rule expressly contemplated a review of the entire record, stating that a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court, on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. [364], 395, 68 S.Ct. [525], 542, 92 L.Ed. 746 (1948). Moreover, Rule 52(a) commands that "due regard" shall be given to the trial judge's opportunity to observe the demeanor of the witnesses; the constitutionally-based rule of independent review permits this opportunity to be given its due.

Bose Corp., 466 U.S. at 499-500, 104 S.Ct. at 1959 (emphasis added)."

Even though the Sixth Circuit Panel Majority is critical of the *Tavoulareas* en banc majority, a fair reading of the *Tavoulareas* opinion does not reveal any statements which are irreconcilable with the prinicples of public figure libel law articulated in the Sixth Circuit's *Connaughton* opinion. The *Tavoulareas* en banc majority, after conducting a *de novo* review of the record, concluded that the plaintiff's evidence did not even support the jury's finding that the article was false. The *Connaughton* Panel Majority, after conducting the same thorough review, concluded that the plaintiff's evidence amply supported his verdict in every respect. Connaughton's evidence on every element which a public figure must prove in order to prevail was manifestly more powerful, both quantitatively and qualitatively, than was Tavoulareas' evidence. The D.C. Circuit would probably have affirmed Connaughton's verdict as easily as the Sixth Circuit did. That

speculation is beside the point, however, as one cannot find in the opinions of these two distinguished appellate courts in the *Connaughton* and *Tavoulareas* cases the requisite degree of potential conflict to make a grant of certiorari appropriate.

Moreover, even if not an exact mirror image of *Tavoulareas*, *Connaughton* evinces an accurate understanding of the *Bose* teaching and its outcome reflects the proper application thereof.

Petitioner also argues that there is a conflict between dictum appearing in the opinion of the California Supreme Court in *McCoy* v. *Hearst Corp.*, 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986), *cert. denied*, 107 S. Ct. 1983 (1987), and the analysis this Court adopted from the Ninth Circuit's opinions in *Guam Fed'n of Teachers, Local 1581* v. *Ysrael*, 492 F.2d 438, 441 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974), and *Alioto* v. *Cowles Communications, Inc.*, 519 F.2d 777, 780 (9th Cir.), *cert. denied*, 423 U.S. 930 (1975), that an appellate judge on review must examine the evidence to see whether, if all possible inferences were drawn in the plaintiff's favor and all questions of credibility were resolved in his behalf, the evidence then would demonstrate by clear and convincing proof that the libelous material was published with actual malice.

Whether such a conflict exists, the clarity and correctness of the Sixth Circuit's legal analysis, reflecting, as it does, a logical and reasoned interpretation of the Supreme Court's directives in *Bose* and other cases, makes it unnecessary for this Court to speak to the subject again. As Judge Krupansky wrote for the Court:

> In turning to the consideration of actual malice in the instant case, this court must, from an examination of the record, first determine if the jury's resolution of the subsidiary or operative facts was clearly erroneous; that is, if, after reviewing the entire evidence, the reviewing

> court was left with the definite firm conviction that a mistake had been made. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

Connaughton, supra, at 843.

Petitioner does not demonstrate that the foregoing is not the proper application of controlling law.

(3) Reversal Of The Judgment Would Be Calamitous

Petitioner and its legion of amici representing the organized media would have the Court believe that only if the judgment in this case is reversed can the First Amendment recover from the staggering blow it has been dealt by the Court of Appeals for the Sixth Circuit. We doubt that the journalistic community has ever seen a record that could support a libel verdict won by a public figure.

In truth, if the *New York Times* rule is to retain vitality, a plaintiff who makes as overpowering a showing of harm, falsity and actual malice as Dan Connaughton made in this case *must* prevail on appeal.

If this Court were to grant certiorari and reverse the judgment, it would accomplish three undesirable ends: (a) deprive Respondent of the benefit of the jury's findings in violation of the Seventh Amendment; (b) sound the death-knell for public figure libel claims and reduce the right to gain redress for the big political lie to a mirage, practically unattainable; and (c) plunge appellate review of public figure libel judgments into the "thorny thicket" of uncharted confusion, leaving each judge free to arrive at his own view of the evidence, not having listened to the testimony or observed the demeanor of a single witness.

The balanced application of *Bose* which the Sixth Circuit so thoughtfully crafted in this case well serves the imperatives of the First *and* Seventh Amendments as well as the authentic

rights of the injured plaintiff. This lawsuit is exemplary of a well-decided public figure libel case. The Sixth Circuit's opinion will serve as a model precedent without embellishment by this Court.

CONCLUSION

For all these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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